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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/771,859	02/03/2004	David J. Domingues	PIL0009/US/2	3505

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EXAMINER	
WONG, LESLIE A	

ART UNIT	PAPER NUMBER
1794	

MAIL DATE	DELIVERY MODE
07/17/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/771,859	DOMINGUES ET AL.	
	Examiner	Art Unit	
	Leslie Wong	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *07 April 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-10,12-23 and 30-36* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-10, 12-23, and 30-36* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-10, 12-23, and 30-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hutkins et al (US 5186962) in view of Franjione et al and Gaier (US 5645877) for the reasons set forth in rejecting the claims in the last office action.

Hutkins et al disclose a food product comprising an edible food item and a dormant, hydrated nontoxic lactic acid microorganism such as *Pediococcus*, wherein the nontoxic microorganism release by-products into the food product to inhibit the growth of harmful microorganism as is claimed (see entire patent, especially claims 1, 8, and 11). Hutkins et al also teach the food product to include meat and vegetable products and about 10^3-10^9 CFU cells bacteria per gram of food (column 11, lines 40-67).

The claims differ as to encapsulation and the specific use of *Streptoccocus thermophilus*.

Franjione et al disclose the use of encapsulation in food products for the purpose of shielding the active ingredient from the surrounding environment, wherein the core material is then released by different means such as mechanical rupture, dissolution, melting, diffusion, ablation, and biodegradation (see entire document, especially page

1). Franjione et al also disclose conventional encapsulating materials including organic polymers (see page 2, fourth full paragraph)

Gaier teaches *Streptococcus thermophilus* as a lactic acid bacteria (see entire document, especially column 3, lines 39-50).

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use encapsulation as taught by Franjione et al and to use *Streptococcus thermophilus* as taught by Gaier in that of Hutkins because *Streptococcus thermophilus* is a conventional lactic acid bacteria and encapsulation is conventional in the food art. Applicant is using known components for their known function to obtain no more than expected results.

Applicant's arguments filed April 7, 2008 have been fully considered but they are not persuasive.

Applicant argues that Hutkins et al do not teach encapsulated dormant hydrated nontoxic microorganisms, that Franjione et al do not teach encapsulation of microorganism, and that Gaier uses microorganism in a different manner.

It is clearly noted that Hutkins et al do not teach encapsulation. Hutkins et al teach a food product comprising an edible food item and a dormant, hydrated nontoxic lactic acid microorganism such as *Pediococcus*, wherein the nontoxic microorganism release by-products into the food product to inhibit the growth of harmful microorganism in the claimed amounts (see column 11, lines 40-67 and claims 1, 8, and 11).

Franjione et al is cited to teach the use of encapsulation in food products for the purpose of shielding the active ingredient from the surrounding environment, wherein the core material is then released by different means such as mechanical rupture, dissolution, melting, diffusion, ablation, and biodegradation (see entire document, especially page 1).

Gaier teaches *Streptococcus thermophilus* as a lactic acid bacteria (see entire document, especially column 3, lines 39-50).

The prior art teaches the use of a dormant, hydrated nontoxic lactic acid microorganism such as *Pediococcus* as is claimed. The prior art also teaches the conventional use of encapsulation for the purpose of shielding and the use of *Streptococcus thermophilus*

Applicant argues against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicant is using known components to obtain no more than expected results.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is 571-272-1411. The examiner can normally be reached on Tuesday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Leslie Wong/
Primary Examiner, Art Unit 1794

LAW
July 15, 2008